
UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

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)
) PROSECUTION RESPONSE TO
) DEFENSE MOTION FOR
) DISMISSAL (MILITARY
) COMMISSIONS IMPROPERLY
) CONSTITUTED IN VIOLATION
) OF 42 U.S.C. §1981)
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15 October 2004

1. Timeliness: This Motion is filed in a timely manner as required by POM 4.
2. Position on Motion: The Prosecution submits that the Defense's Motion should be denied in total.
3. Facts Agreed upon by the Prosecution: The Prosecution admits the facts alleged by the Defense in subparagraphs 4(b) and 4(d) for the purposes of this motion.
4. Facts:
 - a. On 13 July 2004, a charge of conspiracy to commit the following offenses was referred to this Military Commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.
5. Legal Authority Cited:
 - a. 42 U.S.C. § 1981
 - b. Bowers v. Campbell, 505 F.2d 1155 (9th Cir. 1974)
 - c. Davis-Warren Auctioneers, J.V v. F.D.I.C., 215 F.3d 1159 (10th Cir. 2000)
 - d. Davis v. United States Department of Justice, 204 F.3d 723 (7th Cir. 2000)
 - e. Lee v. Hughes, 145 F.3d 1272 (11th Cir. 1998)
 - f. La Compania Ocho, Inc. v. United States Forest Service, 874 F.Supp. 1242 (D. N.M. 1995)
 - g. Grutter v. Bollinger, 529 U.S. 306 (2003)

h. General Bldg. Contractors Ass'n. Inc. v. Pennsylvania, 458 U.S. 375 (1982)

6. Discussion:

The Defense asserts that military commissions violate 42 U.S.C. § 1981. 42 U.S.C § 1981(a) states:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id. The Defense argues that this passage prohibits the trial of the Accused at a military Commission because the Commission does not have equal jurisdiction over U.S. citizens. In making this argument, the defense relies on Bowers v. Campbell, 505 F.2d 1155, at 1974 case out of the Ninth Circuit. In addition to the complications associated with stretching the plain meaning of the words of §1981 to apply to the Accused, the Defense's reliance on Bowers is misplaced because the law has changed since the Ninth Circuit decided Bowers. In 1991, §1981 was amended and the following language was added: "[t]he rights protected by this section are protected against impairment by *nongovernmental* discrimination and impairment under color of *State* law." 42 U.S.C. § 1981(c) (emphasis added). Therefore, the plain language of § 1981 renders the statute inapplicable to federal action. That being the case, the Military Commissions, created by order of the federal executive, is unaffected by § 1981, a law dealing with discrimination by individual States. Every federal court of appeals that has considered this issue since the 1991 amendment reached the same conclusion. See generally Davis-Warren Auctioneers, J.V. v. F.D.I.C., 215 F.3d 1159, 1161 (10th Cir. 2000), Davis v. United States Department of Justice, 204 F.3d 723, 725-726 (7th Cir. 2000), and Lee v. Hughes, 145 F.3d 1272, 1277 (11th Cir. 1998). Only one case after 1991 has adopted a contrary point of view, La Compania Ocho, Inc. v. United States Forest Service, 874 F.Supp. 1242 (D. N.M. 1995), but that case was overruled by Davis-Warren.

Even if § 1981 did apply to federal action, the Supreme Court has held (in the context of State action) that § 1981 provides the exact same protections against state action that the Fifth Amendment provides for federal action. See generally Grutter v. Bollinger, 539 U.S. 306, 343 (2003); General Bldg. Contractors Ass'n. Inc. v. Pennsylvania, 458 U.S. 375, 389-391 (1982). Thus, if § 1981 applied to federal action at all, the analysis would be the same as that applied under the equal protection clause of the Fifth and Fourteenth Amendments. We, therefore, incorporate by reference the arguments made in the Prosecution's Response to Defense's Motion to Dismiss for Violation of Equal Protection and do not burden the Military Commission by repeating them here.

Because 42 U.S.C. § 1981 is inapplicable and, if applicable, applies only the same protections as those found in the Fifth and Fourteenth Amendments (inapplicable to this Accused), the Accused's claim should be denied.

7. Attachments: None

8. Oral Argument: Although the Prosecution does not specifically request oral argument, we are prepared to engage in oral argument if so required.

9. Witnesses: No witnesses will be needed to decide this motion.

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Captain, U.S. Army
Prosecutor